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Case No. 87-658

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1987

W. KENNETH ROSS AND
CAROLE A. ROSS,

Appellants

v.

THE CITY OF ROLLING HILLS ESTATES,
An Incorporated City, THE
PLANNING COMMISSION OF THE CITY
OF ROLLING HILLS ESTATES AND
THE CITY COUNCIL OF THE CITY
OF ROLLING HILLS ESTATES,

Appellees.

ON APPEAL FROM THE

COURT OF APPEAL OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION FOUR

MOTION TO DISMISS APPEAL FROM STATE COURT

ADAMS, DUQUE & HAZELTINE
RICHARD R. TERZIAN
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EDITOR'S NOTE

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MOTION TO DISMISS APPEAL

Appellees The City of Rolling Hills Estates, The Planning Commission of the City of Rolling Hills Estates and The City Council of the City of Rolling Hills Estates (hereinafter referred to collectively as "City"), pursuant to Rule 16 of the Rules of this Court, hereby move the Court for an Order dismissing the appeal from state court filed by appellants on the ground that the federal questions sought to be reviewed were not timely or properly raised and were not expressly passed on by the courts of the State of California.

This motion is based on the various pleadings, briefs and opinions of the courts of the State of California

attached as appendices to the Jurisdictional Statement filed by appellants and on the Statement of the Case and Legal Argument set forth herein.

ADAMS, DUQUE & HAZELTINE
RICHARD R. TERZIAN

By _____
Richard R. Terzian
Attorneys for
Appellees

I. STATEMENT OF THE CASE

On or about February 11, 1986, appellants filed a Petition for Writ of Mandamus with the Superior Court of the State of California pursuant to California Code of Civil Procedure Section 1094.5 challenging the action of the City in refusing to approve the building designs for a proposed addition to appellants' residence.

The appellants' petition alleged, among other things, that the City's View Protection Ordinance ("VPO"), pursuant to which the building design plans were disapproved, was "unconstitutionally vague and overbroad." (Appendix A to Appellants' Jurisdictional Statement, p.5a.)

On April 15, 1986, following a hearing, the Superior Court of the State

of California denied the Petition for Writ of Mandmus. As set forth in its Memorandum Opinion, the Superior Court refused to find the VPO "unconstitutional" on either ground of vagueness or an improper delegation of authority. (Appendix B to Appellants' Jurisdictional Statement, pp.5b-6b.)

Appellants appealed the decision of the Superior Court to the Court of Appeal of the State of California, Second Appellate District ("Court of Appeal"). That Court also upheld the validity of the VPO.

Although appellants made reference to an alleged violation of their rights under the Fifth Amendment to the U.S. Constitution in the next to the last sentence of their Reply Brief to the Court of Appeal (Appendix E to Appellants' Jurisdictional Statement, p.13e),

the Court of Appeal never expressly or impliedly addressed that federal question or any federal question. The Court of Appeal framed the issue of the validity of the VPO to be addressed by that court as follows:

> "Appellants' challenge to the ordinance asserts that due process is denied them because the ordinance language is unconstitutionally vague." (Appendix C to Appellants' Jurisdictional Statement, p.3c.)

In upholding the "constitutional" challenge to the VPO, the Court of Appeal relied solely on California case law and at no time made any reference to any provision of the U.S. Constitution. (Id., at pp.3c-7c.)

Appellants sought review of the Court of Appeal's decision by petition to the California Supreme Court for hearing. In that petition, appellants, for the first time, made reference to specific provisions of the U.S. Constitution allegedly violated by the VPO, namely, the Fifth and Fourteenth Amendments to the U.S. Constitution. (Appendix G to Appellants' Jurisdictional Statement, p.12g.) Significantly, these provisions were not cited in connection with the alleged unconstitutional vagueness of the VPO or the alleged improper delegation of authority under the VPO. Rather, appellants made reference to the provisions of the U.S. Constitution in connection with their newly posited theory that the application of the VPO to appellants' property constitutes an

unconstitutional "taking" of their property without just compensation. (Id.)

The California Supreme Court denied appellants' Petition for Hearing and, thus, never addressed the merits of appellants' Petition. Consequently, appellants filed an appeal to this Court from the Court of Appeal of California, the highest state court to render a decision on the merits of appellants' claim.

II. ARGUMENT

Appellants seek review in this Court under 28 U.S.C. Section 1257(2) which states:

> "Final judgments or decrees rendered by the highest court of

a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . .

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

The questions presented for review in appellants' Jurisdictional Statement are as follows:

1. Has California Permitted the City of Rolling Hills Estates, California To Violate Appellants' Federal Due Process Rights By Holding

That The View Protection ordinance Is Constitutional?

2. Have Appellants' Federal Due Process Rights Under The Fifth And Fourteenth Amendments To The U.S. Constitution Been Violated By The View Protection Ordinance's Improper Delegation Of Authority?

3. When Local Government Regulates Private Property In Such A Way As To Substantially Decrease The Use To Be Made Of And The Value Of The Private Property, Has The Property Been Taken Within The Meaning Of The Fifth and Fourteenth Amendments To The U.S. Constitution? (Appellants' Jurisdictional Statement, p.i.)

The following demonstrates that appellants failed to timely and properly raise any of the foregoing federal questions in the California Court of

Appeal, and further, that the Court of Appeal did not, impliedly or expressly, pass on any of these questions.

A. Alleged Invalidity Of The VPO On Grounds Of Vagueness Under The Due Process Clause Of The Fourteenth Amendment To The U.S. Constitution.

Appellants' claim that the question of the validity of the VPO under the Due Process Clause of the U.S. Constitution was properly and timely raised and passed upon by the Court of Appeal has no merit.

By its own terms, 28 U.S.C. §1257(2) requires that the federal question or questions sought to be reviewed by this Court be "drawn into question" in the state courts.

"There are various ways in which the validity of a state statute may be drawn into question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is regarded as having been adequately presented. (Footnote omitted.)" (New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67, 73 L.Ed. 184, 49 S.Ct. 61 (1928).)

This Court in Zimmerman also stated that where it is not clear whether the claim of invalidity is founded on some provision of the state constitution or the federal constitution or both, there is "plainly...no basis for review in this Court." (Id.)

In the instant case, appellants' Petition for Writ of Mandamus makes absolutely no reference to any provision of the U.S. Constitution upon which the claim of invalidity of the VPO is based. Similarly, the trial court memorandum opinion makes no reference to any federal constitutional provision.

Moreover, the Court of Appeal opinion from which this appeal is taken makes absolutely no reference to a federal constitutional provision. That opinion refers only to appellants' claim

that the VPO is unconstitutionally vague, and states that such a challenge brings into question whether the first essential of due process of law has been violated. (Appendix C to Appellants' Jurisdictional Statement, pp.6b-6c.) In upholding validity of the VPO, the Court of Appeal relied solely on California case law.

Thus, it is not clear whether appellants' claim of invalidity of the VPO is based upon a violation of the California Constitution[1/] or the U.S. Constitution or both. Under the Zimmerman case, there is plainly no

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1/ Article 1, § 7(a) of the California Constitution states in relevant part:

> "A person may not be deprived of life, liberty, or property without due process of law. . . ."

basis for review of this issue by this Court.

In Bowe v. Scott, 233 U.S. 658, 58 L.Ed. 1141, 34 S.Ct. 769 (1914), a case directly on point, this Court held that an allegation that a city ordinance denied the plaintiffs of their rights without due process of law was insufficient to raise a federal question which could be reviewed by this Court, stating:

> "It is settled that such an averment making no reference to the Constitution of the United States and asserting no express rights thereunder is solely referable to the State Constitution, which in this instance has a due process clause, and affords no basis whatever for

invoking the jurisdiction of this court." (233 U.S. at 665.)

Based upon the foregoing authority, the federal question regarding the validity of the VPO under the due process clause of the Fourteenth Amendment to the U.S. Constitution has never been properly or timely raised in the state courts or passed on, either expressly or impliedly by the California Courts and, consequently, does not fall within this Court's jurisdiction under 28 U.S.C. §1257(2).

B. Alleged Invalidity Of VPO Based Upon An Improper Delegation Of Authority.

Nowhere in Appellants' Petition for Writ of Mandamus is there any claim that

the VPO constitutes an improper delegation of authority. Although appellants make this argument in their Memorandum of Points and Authorities in Support of their Petition for Writ of Mandamus (Appendix A to Jurisdictional Statement, p.33a), they fail to point to any provision in the federal constitution which they claim has been violated by the alleged delegation of authority.

Nowhere in the opinion of the Court of Appeal is there any reference to any claim of an improper delegation of authority which violates the United States Constitution. Again, a vague argument relating to the improper delegation of authority is set forth in appellants' Opening Brief to the Court of Appeal (Appendix D to Jurisdictional Statement, p.10d), but no reference is made to any provision of the U.S. Con-

stitution which is violated by the alleged improper delegation of authority.

In short, the federal question relating to an alleged violation of appellants' rights under the Fifth and Fourteenth Amendments to the U.S. Constitution was never properly raised in the state courts even under the broad Zimmerman standard and was never passed on by the Court of Appeal. Accordingly, this Court has no jurisdiction over this issue.

C. Alleged Invalidity Of The VPO Based Upon An Unconstitutional Taking Of Appellants' Property.

Appellants seek review of the issue

of whether the application of the VPO to the appellants' property constitutes an unconstitutional "taking" of their property without just compensation.

The first time this federal question was ever raised in the state courts was in the second to the last sentence of appellants' Reply Brief filed in the Court of Appeal. (Appendix E to Appellants' Jurisdictional Statement, p.13e.)

It is settled law in California that points or issues raised for the first time in a reply brief on appeal will not be considered. (Malmstrom v. Kaiser Aluminum & Chemical Corp., 187 Cal.App.3d 299, 320, 231 Cal.Rptr. 280 (1986).) An exception to this rule may be allowed if good cause is shown for failure to present the points or issues earlier. (In re Marriage of Nolte, 191

Cal.App.3d 966, 975, 236 Cal.Rptr. 706 (1987).) Nowhere in the record before this Court is there any indication that appellants' demonstrated "good cause" for not raising the "taking" issue before they filed their Reply Brief in the Court of Appeal. Having failed to do so, the State Court had no legal authority to, and in fact did not, pass on the question of whether the Fifth and Fourteenth Amendments to the U.S. Constitution are violated by application of the VPO to appellants' property under the Fifth and Fourteenth Amendments to the U.S. Constitution.

This Court has held that:

> "when...the highest state court has failed to pass upon a federal question it will be assumed that the omission was

> due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show to the contrary." (Street v. New York, 394 U.S. 576, 579, 22 L.Ed.2d 572, 89 S.Ct. 1354 (1969).)

Appellants utterly and completely failed to meet this burden of proof with respect to the "taking" issue. Therefore, this federal question is not properly before this Court.

III. CONCLUSION

Based upon the foregoing, appellees respectfully request that this Court grant their motion to dismiss the appeal for want of jurisdiction.

Dated: November ___, 1987

Respectfully submitted,

ADAMS, DUQUE & HAZELTINE
RICHARD R. TERZIAN

By _____
Richard R. Terzian
Attorneys for
Appellees

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I, La Venia Williams, declare:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 523 West Sixth Street, Los Angeles, California 90014.

On November 20, 1987, I served the foregoing document described as Motion to Dismiss Appeal From State Court on the interest parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

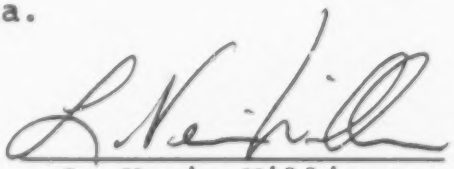
Weisman, Butler & Watson
Laurie J. Butler
9777 Wilshire Boulevard
Suite 600
Beverly Hills, CA 90212

I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California.

I declare under penalty of prejury under the laws of the State of California that the foregoing is true and correct.

I declare that I am employed in the office of a member of the bar of this Court at whose direction service was made.

Executed on November 20, 1987 at Los Angeles, California.



La Venia Williams